

**BOARD OF COUNTY COMMISSION  
AGENDA ITEM SUMMARY**

Meeting Date: 4/20/05 - KW

Division County Attorney's Office

Bulk Item: Yes ☐ No ☒

Staff Contact Person: Bob Shillinger

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**AGENDA ITEM WORDING:**

Approval to advertise a Public Hearing to be held June 15, 2005 at 3:00 p.m. in Marathon, Florida to consider the adoption of a Resolution approving the Recommended Beneficial Use Determination of the Special Master and denial of the Beneficial Use Application of Merrick and Suzanne Kalan.

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**ITEM BACKGROUND:**

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**PREVIOUS RELEVANT BOCC ACTION:**

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**CONTRACT/AGREEMENT CHANGES:**

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**STAFF RECOMMENDATIONS:**

Approval

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**TOTAL COST:** N/A

**BUDGETED:** Yes ☐ No ☐

**COST TO COUNTY:** N/A

**SOURCE OF FUNDS:** \_\_\_\_\_

**REVENUE PRODUCING:** Yes ☐ No ☒ **AMOUNT PER MONTH** \_\_\_\_\_ **Year** \_\_\_\_\_

**APPROVED BY:** County Atty [Signature] OMB/Purchasing \_\_\_\_\_ Risk Management \_\_\_\_\_

**DIVISION DIRECTOR APPROVAL:**

[Signature] 04/05/05  
JOHN R. COLLINS, COUNTY ATTORNEY

**DOCUMENTATION:** Included ☒ Not Required ☐

**DISPOSITION:** \_\_\_\_\_

**AGENDA ITEM #** \_\_\_\_\_



## **NOTICE OF PUBLIC HEARING OF BENEFICIAL USE**

**NOTICE IS HEREBY GIVEN TO WHOM IT MAY CONCERN** that on **June 15, 2005 at 3:00 P.M.** at the **Marathon Government located at 2798 Overseas Highway, MM 47.5 (Gulf), Marathon, Florida** the Board of County Commissioners of Monroe County intends to consider the following Vested Rights/ Beneficial Use Final Determination:

### **Applicant Name**

### **Property Description**

**Merrick and Suzanne Kalan**

**Lot 10 and adjoining Lot 11, Block 4  
Plat of Cahill Pines and Palms Subdivision, Big Pine Key, FL**

Pursuant to Section 286.0105, Florida Statutes, notice is given that if a person decided to appeal any decision made by the Board with respect to any matter considered at such hearings or meetings, he will need a record of the proceedings, and that, for such purpose, he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

Copies of the above-referenced determination(s) are available for review at the various public libraries in Monroe County, Florida.

Dated at Key West, Florida, this 1st day of April, 2005.

(SEAL)

DANNY L. KOLHAGE, Clerk of the Circuit Court  
and ex officio Clerk of the Board of County  
Commissioners of Monroe County, Florida

### **Publication date(s):**

**Key West Citizen (Su) 5/8/2005**

**Keynoter (Sa) 5/7/2005**



**BENEFICIAL USE  
MONROE COUNTY SPECIAL MASTER**

In Re: Merrick and Suzanne Kalan

-Beneficial Use Application

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**PROPOSED  
DENIAL OF BENEFICIAL USE**

The above entitled matter was heard at a duly-advertised and regularly scheduled public hearing on October 26, 2004, before John J. Wolfe, designated Beneficial Use Special Master. Andrew Tobin represented Merrick and Suzanne Kalan (the "Applicants"). Derek Howard represented Monroe County and Director of Planning & Environmental Resources, Marlene Conaway, Beth LaFleur, Planner and Administrative Assistant, Julie Thomson, were present for Monroe County.

**ISSUE**

Whether the Applicants have been denied all reasonable economic use of their property due to the fact that they have not received building permits for their property, and whether the Applicants are entitled to relief under the Policies of Objective 101.18.5 of the Monroe County Year 2010 Comprehensive Plan (the "Plan"), and Section 9.5-173 of the Monroe County Code (the "Code").

**FINDINGS OF FACT**

1. The property of the Applicants subject to this Hearing are unimproved lots located in Cahill Pines and Palms Subdivision, Big Pine Key, and are zoned Improved Subdivision (IS). This zoning allows one single family residential dwelling and accessory uses for each lot.

2. The Applicants purchased Lot 10, Block 4 (RE # 00244200-000000), in May, 1983 for \$55,000, and the adjoining Lot 11 (RE # 00244210-000000) for \$1.00. The Applicants purchased Lot 18, Block 4 (RE # 00244280-000000) in July, 1983 for \$26,000. Such lots are hereinafter collectively referred to as the "Lots".

3. All of the Lots are upland lots located on a canal. The shoreline of Lot 10 has been altered by a seawall. All of the Lots are nearly devoid of vegetation with the exception of some invasive exotics on Lots 10 and 11 and the presence of various native species along the southern property line of Lot 18 and mangrove fringe on the shoreline of Lot 18.

4. The Applicants applied for building permits and entered the Rate of Growth Ordinance ("ROGO") allocation system on April 18, 1997. All lots on Big Pine Key scores a minus ten points for critical habitat due to requirements in the Plan to protect the habitat of Key Deer. Thus, Big Pine



Key lots generally enter the ROGO system with relatively low point scores unless the applicant purchases or combines lots to obtain a higher scoring. The Applicants did not do either. Each Lot has a total of 18 ROGO points, which includes 10 perseverance points. They received one perseverance point for each of the first four years in the ROGO system and two perseverance points for each of the three years thereafter. They will continue to receive two perseverance points per year as long as they are in the ROGO system.

5. The ROGO system allows applicants to apply for Administrative Relief after being in the system for four years pursuant to Code Section 9.5-122.2(f). The Board of County Commissioners conducts a hearing and may as a result of such hearing award an allocation(s) in the next succeeding quarterly allocation period, offer to purchase the property at its fair market value, or suggest other relief as may be necessary or appropriate. Applicants applied for Administrative Relief, but did so one year after the deadline for applying, and thus are no longer eligible to apply for Administrative Relief..

6. After receiving an allocation, an applicant in the ROGO system must also obtain a nutrient reduction credit in order to obtain a building permit. Nutrient reduction credits have been in short supply in recent years, and 95 of the 159 persons who obtained allocation awards did not have nutrient reduction credits. However, it is anticipated that Monroe County will obtain approximately 200 nutrient reduction credits in the near future with the Little Venice wastewater treatment plan coming on line in Marathon. These would be handed out on a first come first serve basis.

7. After receiving an allocation award for a property located on Big Pine Key, an applicant also must obtain a letter of coordination from the U.S. Fish and Wildlife Service ("USF&W"). USF&W is not issuing any such letters until it has approved the Habitat Conservation Plan for Big Pine Key (the "HCP"), which was submitted by the County approximately 18 months ago. Approval had been expected by the County within 6 months.

8. At the date of the hearing, current allocations were not being made pending resolution of an administrative hearing for a proposed rule which would restore some of previously lost ROGO allocations. These allocations had been lost, because the State had determined that the County had not made sufficient progress in bringing waste water treatment plants on line. The State issued the proposed rule after recognizing recent progress, but it was appealed by two groups. If approved, It is expected that allocations which had been lost for the last two years would be restored. The County is working on an ordinance which would protect the positions in line of persons like the Applicants due to the delay caused by the appeal of the proposed rule. The last pre-allocation rankings the Lots received was for the fourth quarter of Year 12 of ROGO and covered the period from April 14, 2004 through July 13, 2004. The pre-allocation rankings were 20, 21 and 22. None of the lots with a higher pre-allocation ranking for such quarter were located on Big Pine Key.

9. Eight market rate allocations may be issued each year on Big Pine Key. There are 32 which have been awarded, but no building permits issued, because USF&W has not issued letters of coordination. The proposed HCP would allow the last two years worth of unissued permits to be issued.



## CONCLUSIONS OF LAW

10. The Improved Subdivision designation of the Lots allows one single family residential dwelling on each Lot, and there are no environmental constraints to development on the Lots.

11. Policy 101.18.5 of the Plan provides that neither the provisions of the Plan, nor the LDR'S shall deprive a property owner of all reasonable economic use of a parcel of real property which is a lot or parcel of record as of the date of the plan. This policy further provides that a property owner may apply for relief from the literal application of applicable land use regulations or of the Plan when such application would have the effect of denying all economically reasonable use of that property, unless such deprivation is shown to be necessary to prevent a nuisance or to protect the health, safety and welfare of its citizens under Florida law. All reasonable economic use is defined as "the minimum use of the property necessary to avoid a taking within a reasonable period of time as established by current land use case law".

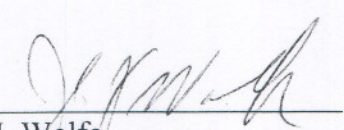
12. Section 9.5-173 of the Code implements the procedure contemplated by Policy 101.18.5 and provides that in order to establish an entitlement to Beneficial Use relief, an applicant must demonstrate that "the Comprehensive Plan and land development regulations" deprive the applicant of all reasonable economic use of the Lot.

13. Applying the above standard to the facts presented herein, it has to be concluded that the Plan and the LDRs do not deny the Applicants all reasonable economic use of the Lots. The Applicants could have filed for Administrative Relief in a timely manner after four years in the system, but did not do so. Failing that, the ROGO system awards two perseverance points per year after year four instead of one. This significantly enhances the competitive position of the Applicants in ROGO. The Applicants also could have combined Lots 10 and 11 for additional points or purchased one or more lots for dedication and obtained additional points. The County and the State have agreed upon a Rule to make up for some of the previously lost allocations due to the failure of the County to adequately address waste water treatment. If this Rule, presently on appeal by two groups, is upheld, there will be additional allocations available. The County has passed the HCP and is waiting on USF&W to respond. This would free up the letter of coordination requirement. In addition, if the proposed ordinance goes into effect, the Applicant's positions in line will be protected by not allowing new applicants to "buy their way" ahead of the Applicants.

## PROPOSED DETERMINATION

WHEREFORE, I recommend to the Board of County Commissioners that a final beneficial use determination be entered denying Applicants' beneficial use applications.

DONE AND ORDERED this 21st day of March, 2005.

  
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John J. Wolfe  
Special Master